Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

LOUISIANA INSURANCE GUARANTY ASSOCIATION,

Petitioner,

v.

SHERMAN J. OLIVIER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Constitution permits the courts in one state to exercise personal jurisdiction over another state's legislatively-created Insurance Guaranty Association, where that Association has neither done business in the forum state nor expressly consented to suit there, and the Association is connected to the litigation only because one of its state's residents happens to be injured in the forum and one of its member insurers does business there.

2. Whether the adjudicatory process in the Court of Appeals, in which the decision was based on outside-the-record factual investigation and fact-finding by that Court, was so contrary to the accepted course of judicial proceedings as to warrant supervisory review.

LIST OF PARTIES

Louisiana Insurance Guaranty Association, Petitioner and Garnishee below.

Sherman J. Olivier, Respondent and Plaintiff below.

South Carolina Property and Casualty Insurance Guaranty Association, Garnishee below.

Alabama Insurance Guaranty Association, Garnishee below.

There are no parent companies or subsidiaries of the foregoing parties. Alabama Insurance Guaranty Association is not involved in the appeal. All parties to the appeal have previously filed Certificates of Interested Parties and Corporate Disclosure Statements in the Eleventh Circuit which remain correct.

There are two other parties which are no longer active in the case -- the insolvent employer Merritt Dredging Company, Inc. and Merritt's insolvent insurer, Midland Insurance Company. Petitioner believes Merritt and Midland have no interest in the outcome of the petition.

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The opinion of the Eleventh Circuit is reported as Olivier v. Merritt Dredging Company, Inc., 979 F.2d 827 (11th Cir. 1992), and is set out as Appendix A. The original panel opirion, later vacated, is reported as Olivier v. Merritt Dredging Company, Inc., 954 F.2d 1553 (11th Cir. 1992) and is set out as Appendix B. The opinion of the District Court is not reported and is set out as Appendix C.

STATEMENT OF THE GROUNDS FOR JURISDICTION

This petition seeks review of a judgment of the Eleventh Circuit Court of Appeals. The date of the decision of the Eleventh Circuit sought to be reviewed is December 21, 1992. The jurisdiction of this Court is based on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV, Sec. 1, set forth in Appendix D.

Various provisions of the statute creating and defining the role of the Louisiana Insurance Guaranty Association (as they existed at the time of the District Court proceedings), including La. Rev. Stat. Ann. §§ 22:1377, 22:1379, 22:1380, 22:1382, 22:1383, and 22:1386, all as set forth in Appendices E-J.

STATEMENT OF THE CASE

Sherman J. Olivier filed an action against Merritt Dredging Company, Inc. under the Jones Act and general maritime law in the United States District Court for the Southern District of Alabama. That Court had admiralty jurisdiction under 28 U.S.C. § 1333, and diversity jurisdiction also existed under 28 U.S.C. § 1332. Olivier sought to recover for personal injuries he sustained while employed by Merritt as a seaman and member of the crew of a vessel which was engaged in dredging operations on navigable waters in Alabama.

Merritt filed a bankruptcy petition in the United States Bankruptcy Court for the District of South Carolina, and Olivier's action against Merritt was stayed. That stay was later lifted to allow this case to proceed to determine the liability of Merritt and to recover insurance proceeds in the event that judgment was entered against Merritt.

In 1986, Midland Insurance Company ("Midland"), which provided Merritt with insurance coverage for the claims asserted by Olivier, was placed in liquidation pursuant to an order of liquidation entered by the Supreme Court of New York. Olivier's action was stayed because of the liquidation proceeding, but that stay was lifted subsequently.

Olivier's Jones Act claim against Merritt was tried in the District Court, a jury returned a verdict in favor of Olivier and against Merritt, and a judgment in the amount of $522,190.00, plus interest, was entered in favor of Olivier and against Merritt.

The Louisiana Insurance Guaranty Association (LIGA) is an unincorporated, non-profit association created by Louisiana statute. It exists to aid Louisiana persons and interests who are beneficiaries of the insurance coverage of insurers which have qualified to do business in Louisiana and thereafter become insolvent.

It derives revenue from a flat-rate assessment against all Louisiana-qualified insurers. Membership in LIGA is compulsory for such insurers, and the assessments are levied based on the premiums charged in Louisiana by member insurers. No variation in assessments occurs because of differences in the types of risks insured or the geographic scope of the members' operations. LIGA exercises no control or influence over its member companies' choices as to (a) what risks to insure or (b) in what other states to do business.

Merritt is (or was) a South Carolina corporation. It purchased Jones Act insurance from Midland through a Maryland broker. The policy premium was calculated based on Merritt's operations in several states, including Alabama but not including Louisiana. LIGA was paid no assessment based on that policy, though Midland was a LIGA member and did other business in Louisiana.

LIGA has no officers, agents, employees, facilities, telephones, or other assets in Alabama. LIGA has never designated an agent for service of process in Alabama and has never applied for authorization or been authorized to do business in Alabama.

After obtaining his judgment against Merritt, Mr. Olivier caused a garnishment to be issued by the District Court against LIGA. LIGA responded by denying personal jurisdiction, filing in support an affidavit setting out the facts repeated in the preceding paragraph. Plaintiff filed no counter-affidavit or other evidence in response.

On December 21, 1990, the District Court granted the motion to dismiss filed by LIGA on the ground that the Court lacked personal jurisdiction over LIGA. Olivier appealed to the Eleventh Circuit Court of Appeals and on March 6, 1992, a panel reversed, holding that personal

jurisdiction existed. LIGA petitioned for rehearing and rehearing en banc. On December 21, 1992, the panel vacated its prior opinion, issued a new opinion holding that personal jurisdiction existed, and denied en banc review.

Another garnishee, South Carolina Insurance Guaranty Association (SCIGA) was a party to the Eleventh Circuit appeal. SCIGA has filed an original and a supplemental certiorari petition, which are pending in this Court as docket number 91-1984.

ARGUMENT AND CITATION OF AUTHORITIES

1. This Court should grant certiorari pursuant to Rule 10.1(c) because the question of one state's jurisdiction over another state's insurance guaranty association is an important and recurring question of federal law, which has never been addressed by this Court, and which should be settled by this Court.

Each of the fifty states has established some form of insurance guaranty program, though the names and details of coverage vary somewhat from state to state. In general, all of the state programs are designed to protect local interests, and the possible coverage of each state's program is triggered by the presence of local property, a local insured, or a resident claimant. See Louisiana Rev. Stat. Ann. § 1379 (Appendix F).

Because of (1) the universality of multi-state business operations and (2) the daily occurrence of the residents of one state traveling to and working temporarily in other states, there are countless occasions on which a claim possibly covered under a given state's insurance

guaranty program may arise in another state. In each such instance, the possibility exists that the courts of the "occurrence" state will be called upon to decide the question of their jurisdiction over another state's guaranty entity. See Georgia Insurers Insolvency Pool v. Brewer, 602 So.2d 1264 (Fla. 1992) (no jurisdiction); Bell v. Senn Trucking Co. of Newberry, 418 S.E.2d 310 (S.C. 1992) (jurisdiction); Rhulen Agency, Inc. v. Alabama Insurance Guaranty Association, 715 F. Supp. 94 (S.D.N.Y. 1989) (no jurisdiction), aff'd on other grounds, 896 F.2d 674 (2d Cir. 1990); Pitco Frialator v. Guaranty Fund Management Services, 590 N.Y.S. 2d 989 (Sup. Ct. Erie Co. 1992) (no jurisdiction).

Certain anomalies already exist because of the absence of a decision by this Court on the jurisdictional issue. For example, the Brewer and Senn Trucking cases cited immediately above each dealt with jurisdiction over the Georgia

Insurers Insolvency Pool. As a result of the conflicting holdings, the Georgia Pool can now be sued in South Carolina but not in Florida, though its status and its relationship with those states is identical. Similar inconsistencies are likely until this Court resolves the question.

Midland, the insolvent insurer involved in this case, was only one of 225 or more property and casualty insurers which became insolvent in the late 1980s. During the time of those insolvencies, the state guaranty associations assessed member companies more than $3 billion to fund the various guaranty programs. Since 1990, other major insolvencies have occurred.

In most states, the level of assessment against solvent insurers to fund the insolvency program is determined by the state insurance commissioner or the Association. See Louisiana Rev. Stat. Ann. §§ 1382 & 1383 (Appendix H and I). It is important for these state officers to

know, in making assessment decisions, whether their claims costs can be controlled by utilizing a corps of experienced in-state claims counsel or, on the other hand, whether they are exposed to claims litigation in all states, with the attendant drastic increase in claims costs.

Because of the history of insurer insolvencies, and the likelihood of similar failures in the future, the question of where litigation against a particular fund may permissibly occur, and therefore what courts will be shaping and defining a particular state fund's obligations, is of critical importance to the funds, their members, and their potential beneficiaries. Because of the importance of that issue, this Court should grant review in this case to settle the question.

2. This Court should grant certiorari pursuant to Rule 10.1(a) because the Eleventh Circuit has decided a federal question in conflict with a decision of the Florida Supreme Court and other courts on the same question.

The Eleventh Circuit determined that the activities and contacts of an insolvent insurer doing business in Alabama may be attributed to the Louisiana Insurance Guaranty Association so as to satisfy the minimum contacts requirement of due process. In Georgia Insurers Insolvency Pool v. Brewer, 602 So.2d 1264 (Fla. 1992), the Florida Supreme Court addressed a question certified to it by one of Florida's intermediate appellate courts. The question certified as being of great public importance was stated by the Florida Supreme Court as follows:

> Whether the conduct of an insolvent insurer doing business in Florida may be shifted to Georgia Insurers Insolvency Pool so as to satisfy the minimum contacts requirement of the due process clause and vest jurisdiction by the Florida courts over the Georgia Insolvency Pool under Section 48.193, Florida statutes?

602 So.2d at 1265. The Florida Supreme Court reviewed the federal due process issue and unanimously determined that Florida's courts could not constitutionally exercise jurisdiction

over the Georgia Pool. In doing so, the Florida Supreme Court expressly acknowledged but "cho[se] not to follow the rationale" of the original panel opinion in this case. Id. at 1268 n.7. Though the parties and underlying facts differ, the decisions in Olivier and Brewer address precisely the same constitutional issue and precisely the same legal arguments, and reach conflicting results, as have other decisions cited in Part 1 above.

3. The Court should grant certiorari pursuant to Rule 10.1(c) because the decision of the Court of Appeals conflicts with applicable decisions of this Court.

The Fourteenth Amendment to the U.S. Constitution, as interpreted by this Court, forbids bringing a civil defendant into a suit in a foreign jurisdiction unless that defendant has certain minimum contacts with the forum or has consented to suit there. International Shoe Co. v. Washington, 326 U.S. 310 (1945). This Court has determined that "all assertions of

state-court jurisdiction must be evaluated according to the standards set forth in International Shoe and its progeny." Shaffer v. Heitner, 433 U.S. 186, 212 (1977). The decision of the Eleventh Circuit directly conflicts with those standards.

a. There are no minimum contacts between LIGA and the forum. The minimum contacts principles flowing from International Shoe were reviewed and summarized by this Court in Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985):

> . . . . "the foreseeability that is critical to due process analysis . . . is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." In defining when it is that a potential defendant should "reasonably anticipate" out-of-state litigation, the Court frequently has drawn from the reasoning of Hanson v. Denckla, 357 U.S. 235, 253, 2 L.Ed.2d 1283, 78 S.Ct. 1228 (1958):
>
> > "The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State.

> The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its law."
>
> This "purposeful availment" requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of "random," "fortuitous," or "attenuated" contacts, or of the "unilateral activity of another party or a third person." Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant himself that create a "substantial connection" with the forum State. Thus where the defendant "deliberately" has engaged in significant activities within a State, or has created "continuing obligations" between himself and residents of the forum, he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by "the benefits and protections" of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well.

471 U.S. at 474-76 (citations and footnotes omitted; emphasis in original).

Similarly, in Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102 (1987) the Court stated:

> The "substantial connection" . . . between the defendant and the forum State necessary for a finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum State.

480 U.S. at 112 (citation omitted; emphasis in original).

In the present record there is no evidence whatsoever of any activity directed toward Alabama residents by LIGA. The affidavit submitted by LIGA on the jurisdiction question established, prima facie, that LIGA has done no business in Alabama, has no offices, employees, assets, property, or service agent in Alabama and has never been authorized to do business in Alabama. Nothing filed by Mr. Olivier contested that affidavit, and no affidavit or other evidence was submitted by Mr. Olivier in support of a claim that LIGA actually has any Alabama presence.

In reality, neither in the District Court nor in the Eleventh Circuit did Mr. Olivier attempt to demonstrate that LIGA itself has any contacts with Alabama. Instead, Mr. Olivier advanced, and the Eleventh Circuit accepted, the proposition that the District Court would have had jurisdiction over Midland, the insolvent insurer. Mr. Olivier then asserts that LIGA "stands in the shoes" of Midland for all purposes, including personal jurisdiction. No case authority was offered, and the entire premise of the argument (at least to the extent that the argument was based on the record -- see Part 4 below) is the portion of the LIGA statute declaring that LIGA is deemed to be the insurer with respect to covered claims. La. Rev. Stat. Ann. § 22:1382 (Appendix H).

In order to appreciate this argument fully, it is important to note that under the LIGA Act, a "covered claim" includes unpaid claims of certain types under a policy issued by an

insolvent Louisiana-authorized insurer where (a) the claimant or insured is a Louisiana resident or (b) the property involved in the claim was permanently located in Louisiana. Id. § 22:1379(3) (Appendix F). No Louisiana property or insured is involved in this case, and Mr. Olivier's claim may arguably be "covered" only because he is alleged to be a Louisiana resident, though he was injured in Alabama. Mr. Olivier's position is simple -- jurisdiction over LIGA follows covered claims. Under that theory of personal jurisdiction, LIGA can be sued in any state in which any of Louisiana's wayfaring residents happen to be injured. No act, conduct or contract by LIGA is needed to give rise to this jurisdiction: So long as a Louisianan is hurt in a particular state, the LIGA Act authorizes a suit against LIGA there.

Mr. Olivier's minimum contacts argument is, in reality, based on nothing beyond naked

foreseeability. It was certainly foreseeable, in the "anything can happen" sense, that a Louisianan could be hurt while working in Alabama for a South Carolina employer whose Jones Act insurance was written by an insurer which became insolvent. In the same way it is foreseeable that a car sold by a New York retailer could be involved in an accident in Oklahoma, or that a tire valve manufactured in Japan could fail on a motorcycle tire in California. But of course that type of foreseeability has been firmly rejected as a basis for personal jurisdiction. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Asahi Metal Industry Co. v. Superior Court, supra. The Eleventh Circuit's misapplication of this Court's minimum contacts jurisprudence must be corrected.

The Eleventh Circuit relied on McGee v. International Life Insurance Co., 355 U.S. 220 (1957), stating broadly that McGee establishes

that "a company with insurance obligations in a state in which it has no other business has submitted to the jurisdiction of the state's courts." 979 F.2d at 833. In McGee, the defendant insurer was sued in California on a life policy. The defendant had in 1948 "mailed a reinsurance certificate to [the insured] in California offering to insure him. . . . He accepted this offer and from that time until his death in 1950 paid premiums by mail from his California home. . . ." 355 U.S. at 221-22. Thus McGee stands for the hardly remarkable proposition that an insurer which 1) solicits a piece of business in a state, 2) issues a policy to a resident of that state, and 3) receives premiums from that state, is subject to suit in that state. McGee involves obvious "purposeful availment," and the insurer's relationship with the California forum there is completely distinguishable from LIGA's relationship to Alabama.

b. There is no consent. "Consent" is of course a valid basis for a state's exercise of personal jurisdiction, since the constitutional requirements for personal jurisdiction may be "intentionally waived." Insurance Corporation of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 704 (1982). The Eleventh Circuit pointed to no contract by which LIGA consented to be sued in Alabama, and pointed to no act, such as designating a service agent in Alabama, from which consent is sometimes inferred. Instead, the "consent" is said to arise from the legislative act creating LIGA and from the Eleventh Circuit's fact-finding regarding the "history" of similar acts.

The Court's conclusion is fairly striking on its face -- that in creating a body operating under the supervision of the Louisiana insurance commissioner to protect Louisiana insureds and residents, the Louisiana legislature intended

that the body be subject to suit nationwide. While that proposition is not impossible, it is certainly so doubtful that some clear evidence to support it must be identified in the Act.

Nothing in the LIGA statute can reasonably be construed as a consent to suit outside of Louisiana. The statute does provide that LIGA may "sue or be sued," La. Rev. Stat. Ann. § 22:1382(2)(c) (Appendix H), but that section says nothing about being sued out-of-state. The most direct provision regarding place of suit is § 22:1380 (Appendix G) which provides that LIGA's "domicile for purpose of suit shall be East Baton Rouge Parish, Louisiana." In the absence of any clearer legislative statement, that section appears to define expressly and exclusively where the State of Louisiana intended that LIGA may be sued.

The mandate of § 22:1382(1)(b) that "to the extent of its obligations on the covered claims" LIGA assume the "obligations" of an insolvent

insurer obviously addresses financial obligations. The preceding subsection, 22:1382(1)(a), speaks of such "obligations" in terms of dollar exposure. Nothing in § 22:1382(1)(a) or (b) indicates the Louisiana legislature intended that LIGA, in assuming an insurer's financial obligations, would also be subject to suit wherever the insurer might be found. No "waiver" of LIGA's due process rights can reasonably be inferred from this provision.

Perhaps the clearest statutory expression of the absence of consent to foreign suit against LIGA is found in § 22:1386(2) (Appendix J), which recognizes situations like the present case in which a claim may be covered in part by more than one state's insurance guaranty law. That section provides:

> (2) Any person having a claim which may be recovered under more than one insurance guaranty association or its equivalent shall seek recovery first from the association of the place of residence of the insured except that if it is a first party claim for damage to property with a permanent location,

> he shall seek recovery first from the association of the location of the property, and if it is a workmen's compensation claim, he shall seek recovery first from the association of the residence of the claimant. Any recovery under this Part shall be reduced by the amount of recovery from any other insurance guaranty association or its equivalent.

Id. § 22:1386(2) (emphasis added). Thus the statute recognizes multiple state association liability, but rejects a joint collection action of the type attempted here. The LIGA statute defines the priority of liability of associations, and requires that a claimant "seek recovery first" from specified associations under specified circumstances. If foreign jurisdiction and foreign multiple-association collection actions were contemplated, a claimant would not be required to "seek recovery first" from any particular plan, since he could sue them all simultaneously. This section in the statute cannot remotely be construed as an agreement by LIGA to be sued in Alabama and in

fact implies that only local suits are contemplated.

The Eleventh Circuit ignored the status, conduct, and contacts of LIGA itself in finding consent to personal jurisdiction. Instead, it focused on "the insurance industry." The dispositive holding of the Court is this:

> In forming the state insurance guaranty associations to avoid federal legislation creating a national guaranty fund, the insurance industry had to anticipate that the guaranty associations would be haled into the same courts where their insolvent members would have been subject to the reach of due process. Thus, SCIGA and LIGA consented to service of process in Alabama in this case.

979 F.2d at 833. The factual validity of that statement is addressed in Part 4 below. As a legal proposition it is truly breathtaking: For due process analysis, LIGA's status as a local Louisiana entity, created by Louisiana law, governed by the Louisiana insurance commissioner, and with no extraterritorial contacts, is totally irrelevant. All that matters is that

LIGA is somehow connected to "the insurance industry" and therefore may be sued wherever insurance business is transacted. This proposition obliterates all previous minimum contacts analysis.

In truth, the sole basis for the Eleventh Circuit's finding of "consent" is its own independent fact-finding discussed in Part 4 below. Absent that, the conclusion that LIGA has intentionally waived its constitutional protection against suit in a forum with which it has no contacts is wholly unsupported.

4. This Court should grant certiorari pursuant to Rule 10.1(a) because, in basing its decision on facts it found from matters outside the record, the Eleventh Circuit so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The factual record in this case is very, very meager. When Mr. Olivier sought writs of garnishment against LIGA and SCIGA, each association responded with affidavits demonstrating the

absence of any actual contacts between the associations and the state of Alabama. Mr. Olivier made no evidentiary response whatsoever. No other evidentiary proceedings occurred in the District Court. In particular, there was no factual inquiry in the District Court regarding the history of any state guaranty program, the funding history of any program, the relationship between state associations generally and the insurance industry, or the historical relationship among the various state legislatures, national insurers, and the state insurance commissioners or their association, the National Association of Insurance Commissioners (NAIC).

On appeal, the Eleventh Circuit panel apparently decided that the factual matters identified in the preceding sentence were dispositive of the issues raised in the case. Without any participation by the parties, the Court made its own factual investigation into

these matters, and premised its decision on the results of that investigation.

In its introductory passages summarizing its decision, the Court stated:

> We find under the interstate arrangements made by the insurance industry to protect policyholders from losses resulting from the insolvency of an industry member, LIGA and SCIGA consented to be subject to the same personal jurisdiction as one of their insolvent members . . . .

979 F.2d at 829 (emphasis added). There is nothing in the record relating to any interstate arrangements made by the insurance industry.

Later, in its review of the facts, the Court stated:

> Insurance guaranty associations were formed by members of the insurance industry to avoid federal legislation that would have created a federal guaranty fund.

Id. There is nothing in the record about federal legislation, a federal guaranty fund, or any concerted activity by insurance companies to avoid such legislation.

In rejecting LIGA's due process arguments, the Court stated:

> A member of the association, acting within the framework of the Interstate compact who becomes insolvent, automatically makes the association the alter ego of that failed member.

Id. at 832 (emphasis added). There is nothing in the record relating to any "Interstate compact."

In addressing LIGA's arguments regarding foreseeability, the Court stated:

> In forming the state insurance guaranty associations to avoid federal legislation creating a national guaranty fund, the insurance industry had to anticipate that the guaranty associations would be haled into the same courts where their insolvent members would have been subject to the reach of due process.

Id. at 833 (emphasis added). There is nothing in the record regarding federal legislation. More importantly, there is nothing in the record supporting the Court's finding that in passing the act creating LIGA, the men and women of the

Louisiana legislature were simply acting as tools of "the insurance industry."

All of the Eleventh Circuit's findings regarding "the insurance industry" and the avoidance of federal legislation are premised on a single published article quoted at 979 F.2d 829-830 and identified in footnote 1 of the Eleventh Circuit's opinion. This publication was not cited to that Court by any party and LIGA was given no opportunity to challenge the historical accuracy of its contents or to explain that the impetus for the model post-insolvency act came not from "the insurance industry" but from the state insurance commissioners -- the state officers who regulate the insurance industry.

In some circumstances, of course, an appellate court's straying from the record to find general background information is harmless. It is quite clear in this case, however, that the fundamental premise for the

Eleventh Circuit's decision was its conclusion that "the insurance industry" impelled the legislative creation of each state fund and therefore, because of the interstate character of insurance business, no one should be troubled by multi-state suit exposure.

This Court has dealt previously with circumstances in which courts of appeals attempt to engage in the fact-finding functions which are by law reposed in the trial courts. In Icicle Seafoods, Inc. v. Worthington, 475 U.S. 709 (1986), this Court gave its direction to the courts of appeals in such situations:

> If the Court of Appeals believed that the District Court had failed to make findings of fact essential to a proper resolution of the legal question, it should have remanded to the District Court to make those findings. If it was of the view that the findings of the District Court were "clearly erroneous" within the meaning of Rule 52(a), it should have set them aside on that basis. If it believed that the District Court's factual findings were unassailable, but that the proper rule of law was misapplied to those findings, it could have reversed the District Court's judgment. But it

> should not simply have made factual findings on its own.

475 U.S. at 714.

In Icicle Seafoods, there existed a factual record in the District Court regarding important factual issues. The Ninth Circuit's error was in reinterpreting the evidence in violation of Rule 52(a). In this case, the Eleventh Circuit's error is more egregious. That Court apparently determined that historical facts regarding the relationship of "the insurance industry" to the creation of state guaranty funds were dispositive, but there was nothing in the record relating to that history. Instead of defining the controlling legal principles and then remanding to the District Court for appropriate fact-finding, the Court of Appeals here went entirely outside the record, conducted its own factual inquiry, and based its decision on the result of that inquiry, without any participation by the parties or the District Court. In doing so, it engaged in a gross

departure from the accepted and usual course of judicial proceedings, as established in Icicle Seafoods and otherwise, to the great prejudice of the garnishment defendants. This Court should exercise its powers of supervision to correct this fact-finding adventure by the Court of Appeals.

CONCLUSION

The petition presents a recurring question of national importance. The Court of Appeals reached a result in conflict with the principles of prior decisions of this Court and did so through a process foreign to the normal judicial process. The petition for certiorari should be granted.

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